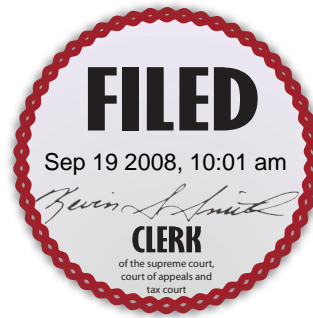


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

JASON W. BENNETT
KYLE B. MANDEVILLE
Bennett Boehning & Clary LLP
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JEREMY FITZGERALD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0802-CR-151

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0702-FA-11

September 19, 2008

MEMORANDUM – NOT FOR PUBLICATION

MAY, Judge

Jeremy Fitzgerald pled guilty to conspiracy to commit battery resulting in serious bodily injury, a Class C felony.¹ He contends his sentence of eight years was inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of January 27, 2007, and the early morning of January 28, 2007, Fitzgerald was at Preston Stickrod's apartment drinking beer and playing video games with Stickrod and others. Stickrod received a phone call indicating Ray Davis had robbed Derrick Goodman during a drug deal. Stickrod telephoned others, and thirteen people, including Fitzgerald, assembled in Stickrod's apartment and agreed to drive to Davis' home to threaten and intimidate him into returning either Goodman's marijuana or the money. Some of these individuals were armed with baseball bats. Fitzgerald, along with some of the other individuals in the group, broke into Davis' apartment. Davis was severely beaten and died from his injuries several months later.

Fitzgerald pled guilty to Class C felony conspiracy to commit battery resulting in serious bodily injury and the State dismissed fifteen other counts. During sentencing, the trial court found four aggravating circumstances: (1) the nature of the offense; (2) Fitzgerald's juvenile and criminal history; (3) Fitzgerald benefited from reduced charges; including dismissal of an habitual offender charge; and (4) Fitzgerald participated in a mob. The trial court found Fitzgerald's cooperation with the police was only a minor mitigating circumstance. The court determined the aggravating circumstances

¹ Ind. Code § 35-41-5-2(a).

outweighed the mitigating circumstances and sentenced Fitzgerald to the maximum of eight years.²

DISCUSSION AND DECISION

Fitzgerald contends the trial court did not give sufficient weight as a mitigating circumstance to his cooperation with the police. He also contends the trial court improperly found as an aggravator that Fitzgerald benefited from reduced charges. He argues he should not have received the maximum sentence for a Class C felony and asks us to revise his sentence to the Probation Department's recommendation of six years.

A trial court may impose “any sentence” the statute authorizes and the Constitution permits, “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). We will reverse a trial court's determination only if there is an abuse of discretion. *Henderson v. State*, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court abuses its discretion if it (1) fails “to enter a sentencing statement at all;” (2) enters “a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;” (3) enters a sentencing statement that “omits reasons that are clearly supported

² The sentencing range for a Class C felony is between two and eight years, with an advisory sentence of four years. Ind. Code § 35-50-2-6(a).

by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” *Id.* at 490-491.

1. Mitigating and Aggravating Circumstances

Fitzgerald first argues that the trial court gave insufficient mitigating weight to his cooperation with the police. The trial court no longer has an obligation to weigh aggravating and mitigating factors, and therefore cannot be said to have abused its discretion in failing to properly weigh those factors. *Id.* at 491.

He next argues the trial court improperly found as an aggravator that Fitzgerald benefited from the reduced charges called for in his guilty plea agreement. We agree that aggravator was improper. *Roney v. State*, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), *trans. denied*. If aggravating factors are not supported by the record or are improper, then “remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 490. While the “benefit of reduced charges” aggravator was improper, we need not remand as we are confident the trial court would have imposed the same sentence based on Fitzgerald’s criminal record.

We are of the opinion the trial court would have imposed the same sentence on Fitzgerald even if it had not found the reduced charges an aggravator. Fitzgerald’s criminal history includes two convictions of auto theft, two convictions of burglary, convictions of possession of cocaine and failure to stop, as well as juvenile adjudications of receiving stolen property and criminal mischief. Fitzgerald’s criminal history alone is enough to permit the maximum eight-year sentence. *See Bennett v. State*, 787 N.E.2d

938, 947 (Ind. Ct. App. 2003) (even if the trial court erred in considering either of the two challenged aggravating circumstances, the trial court could still enhance Bennett's sentence through the single aggravating circumstance of his criminal history).

2. Appropriateness of Sentence

Fitzgerald urges us to revise his sentence pursuant to Indiana Appellate Rule 7(B).³ Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Rule 7(B), which provides we may revise a sentence authorized by statute if it is “inappropriate in light of the nature of the offense and the character of the offender.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007). The burden is on the defendant to persuade us his sentence is inappropriate. *Id.*

With regard to Fitzgerald's character, his criminal history is extensive and includes two juvenile burglary adjudications and one conviction of possession of cocaine. This case before us involves drugs and burglary. Because his criminal history includes offenses similar to the current offense, it is significant. *See Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006) (the significance of a defendant's prior criminal history in

³ Fitzgerald also argues the State failed to acknowledge or respond to the argument that his sentence was disproportionate to that of a codefendant, Jeffrey Pellegrino. Fitzgerald argues Pellegrino played a more active role in beating Davis, but received the same sentence as Fitzgerald even though Fitzgerald cooperated with police. He correctly notes failure to respond to an issue raised by an appellant is akin to failure to file a brief, and to win reversal on such issue, an appellant need only establish *prima facie* error. *Frentz v. State*, 875 N.E.2d 453, 463 n.9 (Ind. Ct. App. 2007), *trans. denied*.

Fitzgerald has not shown *prima facie* error. The sentence received by Pellegrino tells us nothing about Fitzgerald's character. *Green v. State*, 451 N.E.2d 41, 45 (Ind. 1983). We concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character. *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*.

determining whether to impose a sentence enhancement will vary based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Not only is Fitzgerald's criminal history a basis for finding his sentence appropriate, the nature of the current offense is as well. Fitzgerald, along with a mob, conspired to confront Davis about a robbery during a drug deal. Some of Fitzgerald's companions were armed with baseball bats. Fitzgerald and the others broke into Davis' home and severely beat him. Davis suffered massive head trauma and a fractured skull. The fracture went through his left ear, forcing him to use a walker. He suffered such massive head trauma that his brain shut down and began hemorrhaging. Doctors had to induce a coma to prevent further hemorrhages and seizures. When he got home from the hospital, he still suffered multiple seizures each day. He died from his injuries several months later.

Fitzgerald's character and the nature of the offense do not indicate imposition of an eight-year sentence was inappropriate. Accordingly, we affirm.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.